Testimony of Kevin M. Kennedy

Introduction

The information provided by the state's utilities is a key part of the record for the *2005 Integrated Energy Policy Report (Energy Report)* proceeding. Evaluation of this information by Energy Commission staff and other parties will help inform the findings and recommendations in the *2005 Energy Report*, which in turn will form the basis for the transmittal of data and recommendations to the California Public Utilities Commission (CPUC) for the 2006 long-term procurement proceeding.

As noted in the Energy Commission's orders denying appeals of earlier Executive Director determinations on confidentiality of demand data, the Public Records Act (Gov. Code, § 6250 et seq.) states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250) The Act establishes a general principle that every person has the right to inspect any "public record," subject to various exceptions. (Gov. Code, § 6253) Public records are broadly defined, and include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252) In addition, the state Constitution now directs that statutes and regulations shall be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access. (Cal. Const., art. I, § 3, subd. (b)(2))

One exception to the Public Records Act's general rule of disclosure is for trade secrets. While the Energy Commission is bound by state law and its own regulations to respect trade secrets and to protect them when submitted to the Energy Commission, as a matter of policy, the Energy Commission has long advocated for the greatest possible openness in the planning processes. This objective was clearly communicated in the spring of 2003, when the California Public Utilities Commission (CPUC) sought comments on a proposed protective order for one of the early rounds of procurement proceedings, and was reiterated in additional comments filed with the CPUC in January 2004 at the conclusion of that proceeding.[1] IOUs in particular expressed views seeking confidential treatment for a broad range of planning data. Unfortunately, the CPUC process failed to resolve this differences, so when the Energy Commission sought to obtain similar planning data as part of the 2005 Integrated Energy Policy Report Proceeding (*2005 Energy Report*), this underlying conflict in views was replayed in the Energy Commission's own confidential data regulations.

[1] Letter of William J. Keese to CPUC President Michael R. Peevey summarizing Energy Commission ideas about the appropriate nature of confidential protections for procurement-related data, April 16, 2003.

The Energy Commission staff is committed to ensuring that the *2005 Energy Report* policy proceeding is conducted in an open and public manner. Staff understands that all the information that the Energy Commission considers in developing findings and recommendations in the *2005 Energy Report* and accompanying transmittal report for the CPUC will be part of the public record. While monthly demand and monthly specific resource data at the investor-owned utility (IOU) bundled service load level has been granted confidentiality, the Energy Commission will transmit information to the CPUC on the IOU positions through the *2005 Energy Report* process, and expects that all parties will have the opportunity to review and comment on this information. In order to meet this objective, staff proposed releasing public summaries and aggregations of the confidential data for outside parties and Energy Commissioners to review. These summaries and aggregations would allow all parties to understand the supply/demand picture for the state and for the individual utilities, while protecting any underlying data that is confidential. This testimony addresses the aggregation proposals identified in the Executive Director's Notice of Intent to Release Aggregated Data, dated June 3, 2005. These proposals apply to electricity supply data filings provided by all load serving entities within the state that were due on March 1 and April 1, 2005.

The basic dispute under consideration at the Energy Commission's July 13, 2005 business meeting is whether the aggregated summaries of confidential data that staff proposed to publish are themselves trade secrets deserving confidential treatment. As discussed below, staff has determined that the summary tables in the aggregation proposal do not reveal trade secrets, and the arguments put forward by the IOUs in appealing that proposal fail to demonstrate that the information revealed is a trade secret.

Data filed by utilities

The data provided by the IOUs included monthly forecasts of demand, key adjustments to demand, and the resources they own, have under contract, or anticipate for serving that demand. The data was provided for the years 2006 to 2016. The adjustments to demand included portions of the demand that are expected to be served by other parties, such as direct access electricity providers, municipal utilities, or through community choice aggregation, and reductions in demand resulting from future demand response or energy efficiency. The data on resources included specific data on each nuclear or fossil power plant controlled by the IOU, on small (30 megawatts or less) and large (over 30 megawatts) hydroelectric plants, on individual pumped storage facilities. In addition, the resource information included data on qualifying facility (QF) contracts by fuel type, and on all other individual contracts. This data was submitted by the IOUs for four separate scenarios, as directed by the Energy Commission. At this level of detail, this resource plan data has been granted confidentiality under the Energy Commission regulations.

These forms contain two basic types of resource data. The first is monthly productive capacity of the resources, which shows the highest level of supply that is possible in each month. These values are important for electricity planning, because the utilities are expected to have adequate resources to serve the expected peak demand, plus a reserve margin. Capacity data is typically given in megawatts (MW). The second type of resource data is monthly energy data, which shows the total amount of electricity that is expected to be produced over the course of each month. Energy is typically measured in terms of gigawatt-hours (GWh).

Aggregation proposal

The staff developed a set of proposals to provide annual and quarterly summaries of this detailed monthly data. Staff proposed three forms of aggregation. The first would summarize data provided by the IOUs specific to the needs of their "bundled" customers (i.e. those customers for which the utility provides both electricity and electricity distribution services, as opposed to customers who use their distribution service, but who buy their electricity from another company). The second would summarize data identifying the needs of all customers within the IOU's service territory; plus associated publicly-owned utility resources using the IOU transmission system. This approach is referred to as the 'planning area' aggregation. For both of these approaches, aggregated summary tables would be published for each of the resource scenarios filed by the IOUs. A third approach would further aggregate the capacity data from the second by providing a single table that shows the range of capacity values across the different scenarios. Because publication of the second form of aggregation would allow tables to be created, I will not discuss this approach in this testimony.

For each of these proposals, staff proposed to summarize the detailed monthly data in two ways. First, staff proposed to combine the specific resource listings (e.g. individual power plants, or individual contracts) into categories of resources (e.g. utility-controlled fossil resources, or existing & planned renewable contracts). In addition, staff proposed to summarize monthly data on a quarterly and annual basis. For the capacity aggregation, staff would identify values for the single month in which the forecast total peak demand is highest, without identifying what month was selected. For example, in preparing an annual capacity aggregation, if peak demand is highest in August for a specific year, all values in the aggregation for that year will be from August, although August would not be identified. For the energy tables, the data would be summed over the months in quarters and years.

A final feature of staff's aggregation proposal is that it would only include the annual and quarterly summaries for the years 2009 through 2016. Data submitted for years 2006 – 2008 would not be published, even in an aggregated form. Staff has consistently recognized that data for near-term years is more sensitive because there is often limited ability of new electricity generation or demand reduction products to enter the markets in response to utilities' needs, thereby giving existing generators more ability to negotiate more favorable terms. However, release of

longer-term information provides market signals that encourage investment in generating resources and demand reduction programs, thereby allowing IOUs to select from competing suppliers.

IOU response to aggregated data proposals

The three IOUs responded individually to this package of proposed aggregation summaries. None of the utilities opposed the following portions of the staff proposal:

- IOU bundled-customer annual energy data,
- Planning area annual energy data, and
- Planning area annual capacity data.

One or more of the IOUs objected to the following aggregation approaches:

- IOU bundled-customer annual capacity data,
- IOU bundled-customer quarterly capacity data,
- IOU bundled-customer quarterly energy data,
- Planning area quarterly capacity data, and
- Planning area quarterly energy data.

Non-confidentiality of aggregated data

Energy Commission regulations allow the Executive Director to release records designated as confidential if the information has been masked or aggregated to the point necessary to protect confidentiality. In proposing to publish these aggregated data summaries, staff determined that the summaries did protect the confidentiality of the underlying data.

In general, the IOUs have argued that the detailed monthly information is a trade secret because it reveals the amount of capacity or energy that the utilities need to purchase or sell in future months, e.g. the degree of mismatch between resources available to the IOU versus the demand of their customers. They maintain that making this information available to market participants would necessarily lead to higher prices for their rate payers. The Executive Director agreed that the utilities had made a reasonable argument that this monthly, resource-specific data was a trade secret, and so, under the Energy Commission regulations, agreed to keep it confidential.

The IOUs generally further maintain that the IOU bundled-customer annual capacity summary tables and for any of the quarterly summary tables are also trade secrets because they would result in similar economic harm if released. While the detailed monthly data is being treated as confidential, the aggregated summaries do not constitute trade secrets. The IOUs claims of economic harm if these summaries are released fail to account for the long-term beneficial effects that are likely to result, the availability of similar data for the IOUs and for other utilities that operate in the same markets, and the lack of specificity in the summaries. These issues are

summarized below and explained in more detail in the testimony of Dr. Michael Jaske and Julia Frayer.

Long term effects of disclosure

In maintaining that disclosure of incremental information about capacity and energy needs at anytime in the forecast period necessarily results in harm, the utilities ignore the benefits that are likely to result from creating a more open market place in the longer term. The potential harm that may come from market manipulation evaporates when adequate time is available for additional resources, whether new generation resources, transmission upgrades or additions, or demand side management programs, to be brought on line in response to the need. Because the proposed summaries start with data for 2009, publication would allow more than three years during which additional resources are likely to become available in response to identified needs and to increase competition among suppliers. In fact, to the extent that current markets lack sufficient suppliers to ensure competition, failure to make this type of long term planning information freely available has the potential to perpetuate non-competitive markets.

Availability of similar data

Data similar to the aggregated summaries is already available, both for the three utilities appealing the aggregation proposal, and for many other public and private utilities throughout the western United States.

Planning area data in particular is readily available. In fact, the Energy Commission and California Independent System Operator have been collaborating to improve the accuracy of information on the regional supply/demand balances within California. While these efforts have primarily focused on the physical system rather than on what resources are under contract to whom, parties familiar with the regional electricity system can use readily available information to develop a good proxy for the resources available to the utilities. For example, the ownership, capacities and operating profiles of utility-owned power plants such as the San Onofre Nuclear Generating Station are well known, and the specifics of the DWR contracts that provide a large portion of each utilities supply through 2010 are public. The utilities also provide public historic and forecast data to the CA ISO, the CPUC, FERC, and EIA. While the data provided in those forums does not exactly match the data under discussion here, it does provide a pool of data for electricity suppliers and their technical consultants to use to approximate the resource positions of the utilities.

In addition, other private and public utilities throughout the western United States make the type of aggregated summary tables proposed by staff publicly available, and some make substantially more detailed information available. Of the publicly owned utilities (POUs) that provided data to the Energy Commission for the *2005 Energy Report* proceeding, only Imperial Irrigation District (IID) requested confidentiality for the detailed monthly supply plans, and IID agreed to the release of

the aggregated summaries as proposed by the Executive Director. While the investor-owned utilities appealing the aggregation proposal operate under different procurement rules, the POUs do largely buy energy and capacity services from the same markets. If any release of this resource data would have the uniformly negative impacts suggested by the IOUs, these POUs would presumably have also insisted on confidentiality of this planning data.

Lack of specificity in aggregated summaries

The proposed summaries do not provide an adequate level of specificity to be considered a trade secret. Due to the IOU's use of a range of resources to meet need at different times and places within an IOU's planning area, identification of quarterly or annual capacity and energy needs simply does not provide enough information for a potential supplier to derive an economic advantage.

In addition, the energy and capacity data summarized in the aggregated summary tables is only a snap shot of the IOUs' resource balance as it existing in early 2005. All three utilities are in the process of procuring additional resources through one or more mechanisms, such as recent requests for offers from PG&E and SCE and the renewable portfolio standard procurements, that will alter their positions in coming months and years. As the utilities procure additional resources through multiyear contracts and as future demand trends become clearer, the resource balances estimated now by the utilities in their filing for the years 2009 and beyond will shift. Next year's views of the supply/ demand balance for 2009 will most likely reveal lower needs, because the IOU will have acquired contracts or physical resources to partially fill today's understanding of resource need. The utilities also have a degree of flexibility in addressing their long-term resource balance, and are not required to buy (or sell if they have excess) capacity and energy to exactly match their forecast demand for 2009. By the time 2009 approaches and the utilities are required to have adequate resources for that year, their position will have changed significantly.

2000/2001 electricity markets

The utilities generally argue that release of the detailed data, or the aggregated summaries they are appealing, could result in a return to the market manipulation by electricity generators and wholesalers that occurred in 2000 and 2001. This argument ignores the major changes that have occurred in the California electricity market during the past five years.

In 2000 and early 2001, the utilities were mandated to purchase a large majority of their power from a centralized day-ahead hourly energy market. Supply shortages in this market, for whatever reasons, could lead to greatly inflated costs to the utilities.

In 2005, the utilities serve their loads primarily through utility owned power plants and multi-year bilateral power purchase contracts, including the long-term contracts negotiated by the state during the 2001 crisis. The majority of current power

purchasing by the utilities is through organized request for offer (RFO) solicitations. While some market manipulation is possible in this context, especially in the short term when long lead times for new generation resources means that only existing suppliers can submit bids to provide power in such near term years, the utilities are much less vulnerable than when they relied almost entirely on a day-ahead market.

Applicability of CPUC confidentiality rules

In addition to their basic arguments about the trade secret nature of the summary data, the IOUs have argued that the Energy Commission's collaboration with the CPUC in the procurement process binds the Energy Commission to follow the CPUC's confidentiality determinations. While similar data has been provided to the CPUC for past proceedings, the data filed by the LSEs for the *2005 Energy Report* proceeding has not itself been reviewed for confidentiality by any other agencies. It therefore falls on the Energy Commission to determine whether this data should be shielded from release under the Public Records Act based on applicable laws and regulations. Even if it were appropriate for the Energy Commission to apply the CPUC's requirements to this data, the CPUC has been directed by legislation to revisit its own approach to confidentiality, and initiated an Order Instituting Rulemaking to do so at its June 30, 2005 business meeting. It would be premature for the Energy Commission to speculate on what confidentiality rules will be in place for the 2006 procurement proceeding.

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SUMMARY OF QUALIFICATIONS

- Strong environmental and energy policy experience, especially in energy policy development, power plant permitting, environmental review, and electricity and natural gas infrastructure.
- Strong environmental project management experience with Energy Commission and consulting firms, and strong environmental research management skills developed at U.C. Berkeley.
- Ph.D. (Energy and Resources Group at U.C. Berkeley) with an emphasis on integration of technical information and public participation in the formation and implementation of environmental policy.
- Excellent computer skills, including experience with word processing programs, spreadsheets, statistical software, database programs, graphics and presentation programs. Programming experience in modeling and uncertainty analysis for risk assessments and as a systems programmer.

CURRENT EMPLOYMENT

California Energy Commission, since August 2000

Program Manager, Integrated Energy Policy Report (Energy Commission Specialist II), February 2004 to present

Leads the management team for the major biennial energy policy report proceeding. Meets regularly with the Executive Director and the Executive Policy Team to inform them of the project's status, discuss resources and other issues, and develop staff recommendations. Meets regularly with the Committee or its members to inform them of the project's status, present staff recommendations, discuss issues, and receive direction. Required to manage a major project and a diverse team of people, communicate well, have a "big-picture" regarding energy issues, understand the Commission organization and culture, and have the ability to integrate multiple issues and subject areas.

Supervisor, Special Projects Unit (Planner III), March 2003 to February 2004

Directed the work of an interdisciplinary professional staff conducting a wide variety of research and analysis relating to the status and trends in electricity and natural gas. Acted as a leader or member of interdisciplinary teams evaluating the environmental performance of the state's electric generation sector, and in coordinating the role of various state agencies in the permitting of liquefied natural gas facilities. Assisted in developing Commission policy on key environmental and energy infrastructure issues. Represented the Commission before federal, state, and local agencies and interest groups.

Siting Program Manager (Planner III), February 2002 through February 2003

Directed the work of project managers and professional staff engaged in the complex analysis of power plant permitting. Assisted in developing Commission policy and individual project strategy, including staff's analyses of siting applications. Organized and conducted pre-filing meetings between staff and power plant development teams to discuss the siting process. Represented the Commission before federal, state, and local agencies and interest groups. Recruited, trained, and evaluated project managers to meet the requirements of the siting program.

Siting Project Manager (Planner II), August 2000 to February 2002

Directed an interdisciplinary staff in review of power plant permit applications, including implementation of the emergency permit process in early 2001. Served as the Commission's principal representative during the permit process for assigned cases. Identified all strategic, technical, and policy issues associated with power plant applications. Critically reviewed, evaluated and edited all project documents, and acted as editor-in-chief and publisher for major project documents. Conducted meetings among staff and between staff and power plant developers, other government agencies, private organizations, and the public.

EDUCATION

Ph.D. in environmental planning and policy
Energy and Resources Group, University of California, Berkeley, 1996
Dissertation: Local Negotiations in Hazardous Waste Incinerator Permitting: A Comparison of Economic and Communication Models in Four Case Studies

Focused on integration of technical information and public participation in the formation and implementation of environmental policy, with emphasis on management of hazardous materials and waste. Course work in public policy, economics, city planning, epidemiology, and toxicology, which complemented prior background in hazardous waste management, computer modeling, statistical analysis, and applied mathematics. Dissertation research evaluated negotiations between local communities and companies seeking to permit hazardous waste incinerators.

M.S. in environmental technology and policy
Department of Engineering and Policy, Washington University in St. Louis, 1985

Course work included environmental law, energy technology and policy, statistics, simulation and modeling, international development. Conducted statistical analysis of economic, geologic and other data to predict likely areas of groundwater contamination for master's thesis project.

B.A. (cum laude) in applied mathematics and computer programming
Department of Applied Mathematics, Harvard University, 1980

EMPLOYMENT HISTORY

Independent Environmental Consultant, 1996 to July, 2000, part time

Various environmental projects including site assessments and laboratory chemical inventory analysis. For site assessments, evaluated agency records on contaminated sites, conducted site visits, reviewed historical maps, air photos and other historical sources, and prepared reports summarizing evidence of possible environmental concerns associated with the site. For lab chemical inventory projects, analyzed chemical inventories by hazard classification to evaluate building code requirements.

Environmental Sciences Lecturer
University of California, Berkeley, Fall 1997 through Spring 2000, 50% appointment

Instructor for the Environmental Sciences Senior Research Seminar, in which students learn how to conduct primary research by undertaking an independent research project on a topic of current environmental interest. Shared responsibility for overall class of approximately 50 students with another lecturer and teaching assistants, with primary responsibility for advising one-fourth of the students.

Program evaluation research
U.C. Toxic Substances Research & Teaching Program, 1998 to1999, half-time appointment

Evaluated impact of TSRTP's funding of research at the University of California through surveys and interviews of students and post-docs funded by the program examining the use of research findings and the development of the careers of those funded.

Waste management planning services
Brown, Vence & Associates, 1990 to 1993 (part time)

Prepared Hazardous Waste Management Plans for two California cities. Plans included current estimates and projections of hazardous waste generation, estimation of potential for waste minimization among local companies, analysis of the need for facilities to manage locally generated waste, and development and preliminary evaluation of criteria for siting treatment and disposal facilities.

Risk assessment, Superfund site investigations, and computer modeling services
EBASCO Services, Inc., 1985-88

Managed two tasks of the investigation of hazardous waste contamination at Rocky Mountain Arsenal (RMA), with a budget of $1.5 million, starting in September 1987. These tasks

investigated possible soil and groundwater contamination by chlorinated solvents, pesticides, Army Chemical Agents, and related compounds in 11 discrete sites and portions of 12 square-mile sections. Earlier duties included risk assessments for RMA, municipal waste incinerators, and other projects, development and use of software for uncertainty analysis of risk assessments, and regulatory interpretation and guidance.

Systems programming

CL Systems, Inc., 1981-83

Supported and updated the CLSI operating system, which supported computerized library check-in and check-out operations, catalogue database systems, and other library-related systems. Duties also included evaluation of disk subsystem controllers and customer contact during new software releases.

Community organizing

Association of Community Organizations for Reform Now (ACORN), 1980

Worked in Boston to help establish new neighborhood groups associated with ACORN, a national network of community organizations. Supported existing neighborhood groups, including research assistance and coordination of actions by group members on issues of local and citywide concern.

FOUNDATION EXPERIENCE

Switzer Foundation

Served on the selection committee for Switzer Leadership Grants in 2000. These grants are provided to organizations for projects that involve Switzer Fellows in a substantive role in order to give non-profit organizations, educational institutions, and government agencies access to individuals with superior technical and scientific expertise while advancing the professional careers of Switzer Fellowship alumni.

Served on the selection committee for the Switzer Fellowship Grants in 1997 and 1999. These grants are provided to graduate students who demonstrate significant career potential for improving the quality of our natural environment.

FELLOWSHIPS AND AWARDS

California Energy Commission Superior Accomplishment Award, 2001
NIEHS Superfund Research Grant Trainee, 1992-94
University of California, Berkeley, Provost Research Fund Award, 1993
Society for Risk Analysis Student Travel Grant, December 1993
Switzer Foundation Environmental Fellowship, 1989-90
Jacob and Mary Kemler Seitz Fellowship, 1988-89

TEACHING EXPERIENCE

U.C. Berkeley, Fall 1997 through Spring 2000: Lecturer, Environmental Sciences Senior Research Seminar
California State University, Hayward, Winter 1996: Lecturer, Energy Resources and Management
U.C. Berkeley, Spring 1996: Graduate Student Instructor (GSI), Introduction to Environmental Science
U.C. Berkeley, Fall 1994: GSI, Environmental Sciences Senior Research Seminar
U.C. Berkeley, Spring 1990 and Spring 1991: GSI, Quantitative Aspects of Global Environmental Problems
Washington University, Fall 1984: Teaching Assistant, Energy and Human Affairs
Harvard University, 1979-80: Course Assistant, Introduction to Calculus

PAPERS AND PRESENTATIONS

Kennedy, Kevin M. "Local Dynamics in Negotiations over Hazardous Waste Incinerators," presented at the Annual Meeting of the Association for Public Policy Analysis and Management, Pittsburgh, Pennsylvania, October 1996.

Kennedy, Kevin M. "Local Negotiations Over Hazardous Waste Facility Permitting: Effects of Local vs. State Authority," presented at the Annual Meeting of the Association for Public Policy Analysis and Management, Chicago, October 1994.

Koshland, Catherine P., Rosen, Christine Meisner, and *Kennedy, Kevin M.* "Barriers to Hazardous Waste Minimization by Small Generators," poster presentation at the 8th Annual Research Symposium, University of California Toxic Substances Research and Teaching Program, San Diego, October 1994.

Kennedy, K.M. "Risk Communication and Facility Permitting: Responding to Public Concerns," presented at the Annual Meeting of the Society for Risk Analysis, Savannah, GA, December 1993. (Awarded Student Travel Grant for this submission.)

Kennedy, K.M. "Public Participation and Facility Siting: What is Success?" presented at the Annual Meeting of the Society for Risk Analysis, Savannah, GA, December 1993.

Kennedy, Kevin M. "Public Participation and Facility Proposals: Broadening the Scope of Technical Review," student poster presentation at the 86th Annual Meeting of the Air & Waste Management Association, Denver, CO, June 1993.

Irons, L., *K. Kennedy*, C. Haddox, T. Sindelar, D. Borrelli, and C. Scharman. "Successful Geophysical Techniques Used at Rocky Mountain Arsenal and Confirmation of Soil Gas Studies with Groundwater Monitoring," EBASCO Services and Rocky Mountain Arsenal Contamination Cleanup, U.S. Army, September 1988.

Darby, W.P. and *K.M. Kennedy*. "Predicting Areas of Ground Water Contamination," Environmental Engineering: Proceedings of the 1985 Specialty Conference, Sponsored by the Environmental Engineering Division of the American Society of Civil Engineers, ASCE, NY, NY (1985).

PUBLICATION EDITING

Kennedy, Kevin, Tom Dudley, Caryl Waggett, Donna Green, and Astrid Scholz, editors. *Exploring the Environment: Research for Environmental Management.* Senior Research Seminar, Environmental Sciences Major, University of California at Berkeley, May 2000.

Dudley, Tom, *Kevin Kennedy,* Astrid Scholz, Anna Steding, and Caryl Waggett, editors. *Upstream, Downstream: Living in the Watershed.* Senior Research Seminar, Environmental Sciences Major, University of California at Berkeley, May 1999.

Dudley, Tom and *Kevin Kennedy*, editors. *Environmental Science: Policy and Practice.* Senior Research Seminar, Environmental Sciences Major, University of California at Berkeley, May 1998.

References available upon request